NO. 84-534 (2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HUGH JAMES QUIGLEY,

Petitioner,

versus

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WINTER HAVEN, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE SECOND DISTRICT COURT OF APPEAL IN AND FOR THE STATE OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED BELOW

The Tenth Circuit Court in and for Polk County, Florida rendered its Final Summary Judgment in favor of Petitioner on May 9, 1983 in *Hugh James Quigley v. First Federal Savings and Loan Association of Winter Haven,* Case Number GC-G-82-3024. On February 1, 1984, the Second District Court of Appeal for Florida rendered its Opinion reversing the above referenced decision of the Circuit Court in the case of *First Federal Savings and Loan Association of Winter Haven v. Hugh James Quigley*, 445 So.2d 1052 (Fla. 2d DCA 1984) rehearing denied February 29, 1984. The Florida Supreme Court rendered its decision declining to accept jurisdiction for review of the Second District Court of Appeal's Opinion on July 5, 1984 in the case of *Hugh James Quigley v. First Federal Savings and Loan Association of Winter Haven,* Case Number 83-1203.

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I

REGULATIONS INVOLVED IN THE CASE

This case involves the Federal Home Loan Bank Board's "due-on-sale" Regulation found in 12 C.F.R. §545.8-3, formerly 12 C.F.R. §545.6-11. This Regulation is set out verbatim in the Appendix attached to this Brief. See Appendix, pages A-9 to A-18.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case presented by Petitioner, with the exception of the following:

In addition to containing Paragraph 7 as set forth in Petitioner's Statement of the Case, the mortgage also contained the following provision in Paragraph 23, to wit:

> "23. If the said note, or the interest thereon, or any of the sums of money herein referred to or secured hereby are not fully paid within thirty days after the same, or any of them, become due and payable, or if each covenant, agreement, condition and stipulation of said note and this mortgage, or all of them, are not duly performed, complied with and abided by for a period of thirty days, Mortgagee shall have the option to accelerate the payment of the entire principal sum, with interest, as immediately due and payable without notice."

SUMMARY OF ARGUMENT

ARGUMENT I

THE EFFECTIVE DATE OF REGULATION 12 C. F. R. §545.8-3(f) DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW SO AS TO JUSTIFY THIS COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION

Even though the Supreme Court has not ruled on a specific effective date for 12 C. F. R. §545.8-3(f), the date is clearly apparent from a report of the Regulation contained in 41 Federal Register, 18287. Since the effective date is so easily determined, it does not constitute such an "important Federal question" that it would cause this Court to consider it an issue for review under a Writ of Certiorari.

ARGUMENT II

THE PREEMPTIVE EFFECT OF REGULATION 12 C.F.R. §545.8-3(f) HAS BEEN EFFECTIVELY DECIDED BY THIS COURT

The landmark case of *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed. 2d 664 (1982) decided by this Court on June 28, 1982 effectively laid to rest the question of the preemptive effect of 12 C. F. R. §545.8-3(f). The Supreme Court held that this Regulation did preempt contrary State law. Since this Court has already decided this question, it is unnecessary for this Court to again extend its discretionary jurisdiction to consider the same issue.

ARGUMENT I

THE EFFECTIVE DATE OF REGULATION 12 C. F. R. §545.8-3(f) DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW SO AS TO JUSTIFY THIS COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION.

Under Rule 17.1(c), Rules of the Supreme Court of the United States, this Court will consider whether or not a State Court has decided an "*important* question of Federal law" (emphasis added) in deciding to exercise its judicial discretion by granting a Writ of Certiorari.

The question therefore, is whether or not the effective date of a Federal Regulation gives rise to a question so "important" that it must be reviewed by this Court.

The Regulation in question is 12 C. F. R. §545.8-3(f), formerly 12 C. F. R. §545.6-11(f), or the so-called "due-on-sale" Regulation promulgated by the Federal Home Loan Bank Board under the authority of Section 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. §1464(a). This Regulation was the subject of this Court's decision in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S. Ct. 3014, 73 L.Ed. 2d 664 (1982).

When *de la Cuesta* first appeared in the Advance Sheets, this Court noted the effective date of the Regulation as being July 31, 1976. When the case finally appeared in the bound volumes, the reference to July 31, 1976 was dropped and the Opinion reflects only that the Regulation was enacted in 1976. See 458 U. S. at pages 146 and 170.

The Second District Court of Appeal for the State of Florida in the case *sub judice* held the effective date of the "due-on-sale" Regulation to be June 8, 1976 (Appendix, page A-5). The Court below based this finding on the authority of the Federal Register wherein the Federal Home Loan Bank Board's resolution concerning this Regulation is set forth. 41 Federal Register 18287, commencing with the twenty-eighth (28th) line from the bottom, right-hand column, states as follows:

> "Accordingly, the Board hereby revises Section 546.6-11 and adds Section 556.9 to read as set forth below, effective *June 8, 1976."* (emphasis added)

Immediately following the above language, there is set forth the "due-on-sale" Regulation as considered by this Court in *del la Cuesta.*

The July 31, 1976 date relied upon by Petitioner is the effective date of the *limitations* on due-on-sale clauses as contained in 12 C.F.R. §545.8-3(g). The Court below suggested that the reason for the different effective dates for subsections (f) and (g) of the Regulation was to allow for an orderly transition and alteration of mortgage forms. (see Appendix, page A-6; footnote No. 3)

Petitioner urges this Court to exercise its discretionary jurisdiction because the case *sub judice* raises "an important Federal question." The decision to exercise jurisdiction upon this basis is essentially a subjective quality decision which was addressed by this Court in the case of *Equitable Life Assurance Society v. Brown,* 23 S.Ct. 123, 187 U.S. 308, 47 L.Ed. 190 (1902), wherein it was stated:

> "But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real, substantive question on which the case may be made to turn,' that is, 'a real and not a merely formal Federal question is essential to the jurisdiction of this Court.' Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appears that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy, the motion to dismiss will prevail." (See 187 U.S. 308 at page 311)

See also *Zucht v. King*, 43 S.Ct. 24, 260 U.S. 174, 67 L. Ed. 194 (1922).

At point here is the limited question of the effective date of the Federal Regulation. The question is undoubtedly Federal in nature, but because of the clear language of the promulgating authority's resolution adopting the Regulation, it becomes merely a question of form, rather than substance.

Additionally, the one other Court that has had occasion to consider this question had no difficulty finding the effective date of the Regulation to be June 8, 1976. See *Glendale Federal Savings and Loan Association v. Fox*, 459 F. Supp. 903 (DC Calif. 1978), wherein the Court stated:

> "The Bank Board has promulgated specific regulations regarding provisions which a Federal savings and loan association shall and may include in its loan contracts. 12 C.F.R. §545.6-11. With respect to the use of 'due-on-sale' clauses by Federal savings and loan associations, the Bank Board, in April, 1976, adopted certain amendments specifically authorizing the use of such clauses in prescribing certain limitations on their exercise. 12 C.F.R. §545.6-11(f) and (g). These regulations, *which became effective June 8, 1976,* state in pertinent part . . ." (see page 904) (emphasis supplied)

In conclusion, Respondent urges the Court to decline its discretionary jurisdiction for the reason that the issue raised does not present an "important Federal question."

ARGUMENT II

THE PREEMPTIVE EFFECT OF REGULATION 12 C.F.R. §545.8-3(f) HAS BEEN EFFECTIVELY DECIDED BY THIS COURT

The second theory which Petitioner advances as a basis for the exercise of this Court's "important Federal question" jurisdiction is that the lower State Court in the case *sub judice* improperly found that 12 C.F.R. §545.8-3, formerly 12 C.F.R. §545.6-11, preempted State law.

The non-preemptive effect of this Federal regulation is an argument that had been raised repeatedly prior to this Court's decision in *de la Cuesta*. The argument was the central focus of much due-on-sale litigation instituted by and against Federal savings and loan associations and, prior to *de la Cuesta*, was the subject of many contradictory State and Federal Court decisions.

In addressing the question in *de la Cuesta*, this Court took account of Congressional intent and the language of the Regulation and found that 12 C.F.R. §545.8-3(f) clearly preempts State law. As the Court stated:

> "Thus, we conclude that the Board's due-on-sale regulation was meant to preempt conflicting State limitations on the due-on-sale practices of Federal savings and loans and that the California Supreme Court's decision in *Wellenkamp* creates such a conflict." 141 U.S. at 159

Since June 28, 1982, the date the Supreme Court rendered its decision in *Fidelity Federal Savings and Loan Association*

v. de la Cuesta, Courts have uniformly followed this Court's finding and have allowed Federal savings and loan associations to exercise due-on-sale clauses. See, for example, *Independent Federal Savings and Loan Association v. Davis*, 646 S.W. 2d 336 (Ark. 1983), *First Home Federal Savings and Loan Association v. Nance*, 436 So. 2d 805 (Fla. 2nd DCA 1983), *Washington Federal Savings and Loan Association of Florida, a Division of Citizens Savings, a Federal Savings and Loan Association, v. Del Portillo*, 419 So. 2d 805 (Fla. 3rd DCA 1982), *Lindenburg v. First Federal Savings and Loan*, 691 F.2d 974 (11th Cir. 1982), *Egbert v. Freedom Federal Savings and Loan Association*, 14 Mass. App. 383, 440 N.E. 2d 22 (Mass. App. Ct. 1982). The lower Court in the case *sub judice* simply followed the dictates of this Court as found in *de la Cuesta*.

The case *sub judice* involves a post-regulation mortgage originated by a Federal savings and loan association containing a due-on-sale provision qualifying under the definition set forth by this Court in *de la Cuesta*. The lower Court, relying heavily on *de la Cuesta*, has found that the due-on-sale Regulation preempted any State law to the contrary and that Respondent held a mortgage with an enforceable due-on-sale clause.

If Petitioner's "non-preemptive" argument were adopted, the thurst of *de la Cuesta* would be mutilated. Petitioner apparently wants to re-argue *de la Cuesta*. That is not legitimate ground for Certiorari.

Inasmuch as this question has been "so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy", the issue raised by Petitioner does not involve an "important question of Federal law" and thus, this Court should decline to accept jurisdiction. See *Equitable Life Assurance Society v. Brown, supra*, at page 311.

CONCLUSION

In conclusion, Respondent suggests that jurisdiction does not lie for the following reasons:

1. The effective date of 12 C.F.R. §545.8-3(f) does not constitute such an "important Federal question" as to cause this Court to exercise its discretionary jurisdiction under 28 U.S.C. §1257(3).

2. This Court has previously decided in *de la Cuesta*, supra, that 12 C.F.R. §545.8-3(f) preempts any State law to the contrary.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three (3) true and correct copies of the above and foregoing were mailed to Petitioner, HUGH JAMES QUIGLEY, Post Office Box 2344, Lake Wales, Florida, 33853, Petitioner on the 2nd day of November, 1984.

Roy C. Summerlin p.m.s.

ROY C. SUMMERLIN

Debra L. Cline p.m.s.

DEBRA L. CLINE

APPENDIX I

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

FIRST FEDERAL SAVINGS AND
LOAN ASSOCIATION OF WINTER
HAVEN, a corporation,

Appellant,

v.

HUGH JAMES QUIGLEY,

Appellee.

CASE NO. 83-1203

Opinion filed February 1, 1984.

Appeal from the Circuit Court for Polk County; E. Randolph Bentley, Judge.

Roy C. Summerlin and Debra L. Cline of Summerlin, Connor and Braisted, Winter Haven, for Appellant.

Hugh James Quigley, Lake Wales, Pro Se.

GRIMES, Judge.

Once again we consider the effectiveness of a due-on-sale clause contained in a federal savings and loan association mortgage.

On July 23, 1976, Jack and Lillian Cobb gave First Federal Savings and Loan Association of Winter Haven (First Federal) a mortgage on their home. The mortgage contained the following paragraphs:

7. No conveyance of said property, or any part thereof, shall be made by Mortgagor without the written consent of Mortgagee and without assumption by the grantee in the form prescribed by Mortgagee of the obligation to Mortgagee hereunder. In any event Mortgagee may, upon such conveyance by Mortgagor, deal directly with Mortgagor's grantee without any notice to Mortgagor in all respects pertaining to this mortgage, and may forbear to sue or may extend times for payment of the debt secured hereby without discharging or in any way affecting the liability of Mortgagor hereunder.

23. If said note, or the interest thereon, or any of the sums of money herein referred to or secured hereby are not fully paid within thirty days after the same, or any of them, become due and payable, or if each covenant, agreement, condition and stipulation of said note and this mortgage, or all of them, are not duly performed, complied with and abided by for a period of thirty days, Mortgagee shall have the option to accelerate the payment of the entire principal sum, with interest, as immediately due and payable without notice.

On April 25, 1982, Hugh J. Quigley (Quigley) contracted to buy the Cobbs' home. The purchase contract contained the following provision:

> Purchaser shall make application to FIRST FEDERAL SAVINGS & LOAN OF W. H.

> for the purpose of qualifying for the assumption of the existing first mortgage held by said bank, in the approximate balance of $43,500.00, and which has approximately 15 years to run, provided, however, that said first mortgage does not escalate above 8–½% per annum in its interest rate. The balance of the principal price in the form of a purchase money second mortgage which the Seller agrees to take back, for a period of fifteen (15) years, amortized on equal monthly installments, including principal and interest at the rate of 10% per annum. In the event either of the above-mentioned mortgages are not forthcoming, Buyer shall have the right to cancel this contract and receive immediate return of all deposit monies. . . .

Quigley applied to First Federal for approval of assumption of the mortgage. First Federal agreed to approve Quigley for assumption subject to the following options:

1. Service Charge 5 Point Fee, No Interest Rate adjustment, 1 year Balloon Payment

OR

2. Service Charge 2 Point Fee, Interest Rate adjusted to 12 ¾% fixed rate.

First Federal also advised Quigley that should he consummate the sale without its approval, the mortgage would be accelerated. Rather than going forward with the purchase. Quigley brought a declaratory judgment action against First Federal.

While the suit was pending, the United States Supreme Court in *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982), rendered a sweeping decision determining that a Federal Home Loan Bank Board regulation which permitted federal savings and loan associations to use due-on-sale clauses in their mortgages preempted California law. Notwithstanding, the trial court entered summary judgment for Quigley, holding that First Federal's due-on-sale clause could not be accelerated by virtue of the sale of the property and that First Federal could not condition its approval upon an increase in interest rates or the payment of mortgage loan points. First Federal appeals this ruling.[1]

The court below distinguished *de la Cuesta* on three grounds:

1. *Mortgage executed before effective date of regulation.*

The Cobbs' mortgage was executed and delivered on July 23, 1976. The court determined that the federal regulation authorizing due-on-sale clauses did not become effective until July 31, 1976. Two of the mortgages in *de la Cuesta* also predated the regulation, but at the time the regulation was enacted California had always permitted the unfettered acceleration of due-on-sale clauses upon the sale of mortgaged property. It was only after the regulation was passed that the California Supreme Court first adopted a rule that due-on-sale clauses could not be enforced unless the security of the mortgage was jeopardized by the sale. Hence, the Supreme Court found it unnecessary to consider whether

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1. The court's determination that Quigley had the requisite standing to sue has not been challenged on this appeal.

the regulation had retroactive effect. In the instant case, the trial court declined to give the regulation retroactive effect and concluded that, unlike California, preexisting Florida law prohibited the use of due-on-sale clauses absent a showing of impairment of security.

Actually, the regulation became effective before the mortgage was executed. When the *de la Cuesta* opinion first appeared in advance sheets, the Supreme Court noted that the effective date of the regulation was July 31, 1976. When the case finally appeared in the bound volumes, the reference to July 31 was dropped, and the opinion reflects only that the regulation was enacted in 1976. In fact, the board's specific authorization for the enforcement of due-on-sale clauses is contained in 12 CFR §545. 8-3(f) (1982),[2] which became effective on June 8, 1976. 41 Fed. Reg. 18287 (1976). The confusion resulted because subsection (g) of the regulation which contains certain limitations on

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2. 12 CFR §545. 8-3(f) (1982) provides:

> (f) *Due-on-sale clauses.* An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract.

due-on-sale clauses in mortgages executed after July 31, 1976, was enacted to become effective on July 31, 1976.[3]

II. *Language of the mortgage does not constitute an enforceable due-on-sale clause.*

The court also held that First Federal's due-on-sale clause could not be enforced because it did not contain the limitations required by subsection (g) of the regulation. Yet, subsection (g) did not become effective until July 31, 1976. The Cobb mortgage was executed during that short period of time in which due-on-sale clauses were specifically authorized without any limitations.[4] However, Quigley cannot complain because even if subsection (g) had been in effect, none of its limitations would have been applicable to this transaction.

The due-on-sale clause most often used in loan instruments is paragraph 17 of the uniform mortgage instrument developed by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association, which is quoted in the *de la Cuesta* opinion. Quigley's argument

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3. References to paragraphs (d) and (e) of the regulation suggest the reason for the differences in dates. Paragraph (d) pertaining to late charges was made effective on June 8, 1976, but an explanatory note in 41 Fed.Reg. 18287 (1976) points out that the effective date of paragraph (e) relating to limitations on late charges was delayed until July 31, 1976, to allow for an orderly transition and alteration of mortgage forms. Presumably, the same rationale prompted the delay in the effective date of paragraph (g) concerning limitations in the due-on-sale clauses.

4. Evidently, the Federal Home Loan Bank Board was not troubled over the creation of a hiatus period because of its view that due-on-sale clauses were already permitted under prior regulations. See *de le Cuesta*, 458 U.S. at 147, 102 S.Ct. at 3019, 73 L.Ed.2d at 671.

that the language of First Federal's mortgage fatally departed from the customary wording of due-on-sale clauses cannot be sustained because *de la Cuesta* defined a due-on-sale clause as "a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred." 458 U.S. at 145, 102 S.Ct. at 3018, 73 L.Ed.2d at 670. Paragraph 7 of the Quigley mortgage provided that the mortgaged property should not be conveyed without the written consent of the mortgagee, and paragraph 23 specified that upon the failure to comply with any condition of the mortgage, the mortgage had the option to accelerate payment of the entire unpaid balance. Regardless of the form of the language, when read together, these provisions constitute a due-on-sale clause.

III. *State court's equity jurisdiction not subject to preemption.*

Finally, the trial court reasoned that one who seeks to foreclose a mortgage in a state court must accept the equitable doctrines recognized by that court. Our court had originally adopted this analysis in *First Federal Savings & Loan Association v. Lockwood,* 385 So.2d 156 (Fla. 2d DCA 1980), when we held that a state trial court could deny a federal savings and loan association the right to enforce a due-on-sale clause absent an impairment of security. However, our view on preemption was clearly overruled in *de la Cuesta* when the Supreme Court held that the California courts could not apply state law to prevent the enforcement of due-on-sale clauses in federal savings and loan association mortgages. Thus, we recently reversed the refusal to enforce a due-on-sale clause contained in such a mortgage. *First Home Federal Savings & Loan Association v. Nance*, 436 So.2d 163 (Fla. 2d DCA 1983). *See Washington*

Savings & Loan Association v. Concepcion del Portillo, 419 So.2d 805 (Fla. 3d DCA 1982), in which out sister court interpreted the *de la Cuesta* decision in a similar manner.

The summary judgment for Quigley is reversed. We also reverse the court's determination, attacked on cross-appeal, that First Federal is entitled to charge a nominal transfer fee to cover the cost of changing its records to reflect a new ownership. This point was never an issue between the parties, and there was no evidence introduced to support the court's conclusion that it was a routine and customary practice of savings and loan associations to charge a nominal transfer fee.

OTT, C. J., and CAMPBELL, J., Concur.

APPENDIX II

* * * *

sidual value, and not on the residual market value of the leased item.

(c) *Salvage powers.* If, in good faith, an association believes that there has been an unanticipated change in conditions which threatens its financial position by significantly increasing its exposure to loss, the provisions of paragraphs (a) and (b) of this section shall not prevent the association:

(1) As the owner and lessor under a net, full-payout lease, from taking reasonable and appropriate action to salvage or protect the value of the property or its interests arising under the lease; or

(2) As the assignee of a lessor's interest in a lease, from becoming the owner and lessor of the leased property pursuant to its contractual right, or from taking any reasonable and appropriate action to salvage or protect the value of the property or its interests arising under the lease.

(3) Additional terms. The provisions of paragraphs (a) and (b) of this section do not prohibit an association from including any provisions in a lease, or from making any additional agreements, to protect ints financial position or investment in the circumstances set forth in subparagraphs (1) and (2) of this paragraph (c).

[47 FR 3542, Jan. 26, 1982; 47 FR 4498, Feb. 1, 1982]

§ 545.7-11 Investment in State and local government obligations.

(a) *Definitions.* (1) "Residential real estate" – homes

(including condominiums and cooperatives), combinations of homes and business property, other dwelling units, or combinations of homes and dwelling units, including homes and business property involving only minor or incidental business use.

(2) "Obligations of or issued by the home state or political subdivisions thereof" – obligations (including loans) of or issued by the home State or political subdivisions thereof, or of or by agencies, corporations, or instrumentalities of the State or political subdivisions thereof.

(b) Any Federal association whose general reserves, surplus and undivided profits aggregate a sum in excess of 5 percent of its withdrawable accounts may invest in, or commit itself to invest in, obligations of or issued by its home State or political subdivisions thereof where the proceeds of such obligations are to be used for the rehabilitation, financing or construction of residential real estate; *Provided* (except with respect to loans), That:

(1) The obligations are rated in one of the four highest grades as shown by the most recently published rating made of such obligations by a nationally recognized investment rating service; or

(2) The obligations, if not rated, are approved by the Bank Board.

(c) The aggregate outstanding investment under this section shall not exceed the amount of the association's general reserves, surplus and undivided profits, and no more than 25 percent of that sum may be invested in obligations of or issued by any one issuer.

[44 FR 47761, Aug. 14, 1979, as amended at 47 FR 36620, Aug. 23, 1982]

GENERAL PROVISIONS RESPECTING LOANS

Source: Sections 545.8-2–545.8-11, 44 FR 39128, July 3, 1979, unless otherwise noted.

§ 545.8-2 Initial loan charge.

Except as provided in §563.35(d) of this chapter, a Federal association may require a borrower to pay necessary initial charges connected with making a loan, including the actual costs of title examination, appraisal, credit report, survey, drawing of papers, loan closing, and other necessary incidental services and costs, in such reasonable amounts as the board of directors may fix. The association may collect the charges from the borrower and pay the persons rendering services. An association also may require the payment of interest at the time of loan closing in the form of "acquisition credits," as defined in §563.23-1(g)(2) of this chapter.

[44FR 39128, July 3, 1979, as amended at 47 FR 36620, Aug. 23, 1982]

§545.8-3 Contract provisions for real estate loans.

(a) *Required and authorized provisions.* Each loan shall be evidenced by note, bond, or other instrument and be secured by a security instrument which is consistent with sound lending practices. Loan instruments shall comply with applicable provisions of law, governmental rules and regulations, and the association's charter and bylaws, and provide for full protection to the Federal association. They shall be recorded and, among other protections, shall provide specifically for full protection with respect to insurance, taxes, assessments, other governmental levies, maintenance, and repairs. They may provide for an assignment of rents. The

association may pay taxes, assessments, insurance premiums, and other similar charges for protection of its interest in the security property. If such payments are consistent with this part, they may be added to the unpaid balance of the loan. The association may require life insurance to be assigned to it by the borrower as additional collateral for a loan on the security of real estate. It may advance premiums on such life insurance and, if consistent with this part, add the premiums so advanced to the unpaid balance of the loan. A Federal association shall keep a record of the status of taxes, assessments, insurance premiums, and other charges on all real estate on which it has loans or which it owns.

(b) *Escrow accounts.* (1) An association may require that all or any part of the estimated annual taxes, assessments, insurance premiums, and other charges on any loan be paid in advance to the association in addition to interest and principal payments on the loan, to enable the association to pay such charges as they become due. With regard to any loan on the security of a home, made in whole or in part by the association, the association shall not require that the borrower deposit in any escrow account established to assure payment of taxes, assessments, insurance premiums, and other charges, (i) before or on the date of settlement, an aggregate sum in excess of *(a)* the total amount of such charges owed by the borrower and due and payable during the period ending on the due date of the first installment payment under the loan *plus (b)* one-sixth of the estimated total amount of such charges that will become due and payable during the 12-month period following the due date of the first installment payment *plus (c)* if the amounts deposited or to be deposited with the association pursuant to paragraph (1)(ii) of this paragraph (b) would be insufficient to avoid a deficiency on the due date of such charges, the amount necessary to avoid such deficiency, and (ii) beginning

with the due date of the first installment payment, the *pro rate* portion (based on the number of installment payments due during the 12-month period following the due date of the first installment) of the estimated total amount of such charges that will become due and payable during the 12-month period following the due date of the first installment payment *plus* such amount as is necessary to maintain an additional balance of one-sixth of the estimated total amount of such charges.

(2) If the association determines there will be a deficiency on the due date of such charges, it may require that additional deposits, sufficient to make up the deficiency, be submitted in equal amounts with each payment up to the date upon which such charges become due and payable. After giving the borrower notice of such deficiency and of the additional deposits required to make up the deficiency the association may deduct the necessary amounts from the borrower's regularly-scheduled installment payments if the borrower fails to make the additional deposits.

(c) *Payment of interest on escrow accounts.* (1) An association shall pay interest on an escrow account maintained in connection with a loan, if:

(i)The loan is on the security of a single-family dwelling occupied or to be occupied by the borrower;

(ii) The loan was made after June 15, 1975, and no bona fide loan commitment was made before that date; and

(iii) A specific statutory provision(s) of the State in which the security property is located generally requires State-chartered savings and loan associations, mutual savings banks, and similar institutions to pay such interest.

(2) The interest rate shall at least equal the rate required for such State-chartered institutions but shall not exceed the rate the Federal association pays on regular accounts.

(3) Unless obligated by contract, a Federal association shall have no obligation, other than under this paragraph (c), to pay interest on escrow accounts.

(d) *Late charges.* An association's loan instruments may, as a matter of contract between it and the borrower, provide for assessment, imposition, and collection of a late charge respecting payment of any delinquent periodic installment payment. The charge may be in the form of an increased rate of interest on the unpaid balance of the loan (or a part thereof) for the period of delinquency, a percentage of the delinquent periodic installment payment (or a part thereof), a fixed dollar amount, or such other form as may be necessary and appropriate to fully protect the association. No form of such late charge shall be considered as interest to the association. The association shall not deduct late charges from regular periodic installment payments on the loan, but shall collect them as such from the borrower. Except as provided in paragraph (e) of this section regarding loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, assessment, imposition, and collection of such late charges shall be exclusively governed by the terms of the loan contract. Collection of a late charge shall not impair, alter, or abrogate any other right of the association granted by contract or law respecting delinquent installment payments.

(e) *Limitations on late charges.* (1) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, no late charge, regardless of form, shall be assessed or collected by a Federal association:

(i) As to any periodic installment payment received by it within 15 days after the due date of such payment (if such period ends on a weekend or holiday it shall be extended to the next business day);

(ii) In a dollar amount exceeding 5 percent of the aggregate amount of principal and interest included in the deliquent periodic installment payment and in no case exceeding the amount prescribed in the loan contract;

(iii) Unless any monthly billing, coupon, or notice the association may provide regarding installment payments due on the loan discloses the date after which the charge may be assessed; or

(iv) More than one time for late payment of the same installment.

(2) Any installment payment made by the borrower shall be applied to the longest outstanding installment due.

(3) A Federal association, in an appropriate case, may elect to waive all or any portion of an authorized late charge.

(f) *Due-on-sale clauses.* An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract.

(g) *Limitations on the exercise of due-on-sale clauses.* With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association: (1) Shall not exercise a due-on-sale clause because of (i) creation of a lien or other encumbrance subordinate to the association's security instrument,

(ii) creation of a purchase money security interest for household appliances; (iii) transfer by devise, descent, or operation of law on the death of a joint tenant; or (iv) granting of a leasehold interest of three years or less not containing an option to purchase; (2) shall not impose a prepayment charge or equivalent fee for acceleration of the loan by exercise of a due-on-sale clause; and (3) waives its option to exercise a due-on-sale clause as to a specific transfer if, before the transfer, the association and the person to whom the property is to be sold or transferred (the existing borrower's successor in interest) agree in writing that the person's credit is satisfactory to the association and that interest on sums secured by the association's security interest will be payable at a rate the association shall request. Upon such agreement and resultant waiver the association shall release the existing borrower from all obligations under the loan instruments, and the association is deemed to have made a new loan to the existing borrower's successor in interest.

(Sec. 10, 47 Stat. 725 (12 U.S.C. 1421 et seq.) sec. 5, 48 Stat. 132 (12 U.S.C. 1464), as amended by sec. 401, 94 Stat. 160; secs. 402, 403, 407, 48 Stat. 1256, 1257, 1260, as amended (12 U.S.C. 1725, 1726, 1730), Reorg. Plan No. 3 of 1947, 12 FR 4891, 3 CFR, 1943-48 comp., p. 1071)
[44 FR 39128, July 3, 1979, as amended at 44 FR 57386, Oct. 5, 1979; 45 FR 76103, Nov. 18, 1980; 47 FR 36620, Aug. 23, 1982]

§ 545.8-4 **Servicing of loans.**

A Federal association may, except as otherwise limited by regulation, service any loan which it owns or in which it has a participation interest. It may also service for others any loan in which:

(a) It has owned any interest at any time;

(b) Any of its members owns any interest;

(c) A service corporation of the association owns any interest;

(d) The Federal Savings and Loan Insurance Corporation, the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, or the Government National Mortgage Association has owned any interest at any time;

(e) The Federal Savings and Loan Insurance Corporation holds any interest as conservator, receiver, or other legal custodian of an institution it insures (whether or not the institution is in default);

(f) An institution insured by such Corporation owns any interest acquired under § 563.9 or § 563.9-1 of this chapter; or

(g) Total proceeds were disbursed, and sole ownership is retained, by a public housing corporation, or a not-for-profit private organization, established or chartered by any State or political subdivision thereof (including the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States) if: (1) The principal office or a branch office of such association is located in such State or political subdivision; (2) the sole purpose of such corporation or organization is to provide directly or indirectly for housing and incidental services, including financing, particularly for families of low or moderate income; and (3) undertaking to service such loan will not cause the total outstanding balance of all such loans serviced by such association to exceed 25 percent of its mortgage portfolio.

§ 545.8-5 Loan payments.

(a) *Initial payments on monthly installment basis and flexible payment loans.* Payments on loans made under §§ 545.6-2 and 545.6-3(a) shall begin not later than 60 days after the loan is disbursed. If such loans include construction, substantial alteration, repair, or improvement

loans, payments may begin not later than 36 months (18 months for loans secured by real estate consisting solely of one or more homes or combination of home and business property) after the date of the first disbursement, and interest shall be payable at least semiannually until regular periodic payments become due.

(b) *Loan payments and prepayments.* Payments on the principal indebtedness of all loans on real estate shall be applied directly to reduction of such indebtedness, but prepayments made on an installment loan may be reapplied from time to time wholly or

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